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# In the Supreme Court of the United States

No. [redacted] 125

OCTOBER TERM, 1958.

HENRY H. PLEASANT,
*Petitioner,*

vs.

CLEVELAND BAR ASSOCIATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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# In the Supreme Court of the United States

No.

OCTOBER TERM, 1958.

HENRY H. PLEASANT,

*Petitioner,*

vs.

CLEVELAND BAR ASSOCIATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner, Henry H. Pleasant, prays that a writ of certiorari issue to the Supreme Court of the State of Ohio, to review the decision and the judgment of that court and the order denying petitioner's application for rehearing, in the case of the Cleveland Bar Association vs. Pleasant, docketed as case No. 1 on the Disciplinary Docket of said court. Said judgment confirmed findings of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, declaring that the petitioner had violated Canons 6, 29, 32 and 38 of the Canons of Professional Ethics, and suspended petitioner indefinitely from the right to practice law in the State of Ohio. Said judgment was rendered on March 5, 1958 and petitioner's application for rehearing, duly filed, was denied on March 26, 1958.

## OPINION BY COURT BELOW.

The only court which considered and passed upon the questions here presented was the Supreme Court of Ohio. Its opinion is reported in 167 O. S. 325 and is printed in the Appendix hereto, pages 31a-44a.

## JURISDICTION.

Jurisdiction to review the aforesaid judgment and order is conferred on this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. C. Sec. 1257. The portion of that section pertinent to jurisdiction in this review provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) by writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States."

## QUESTIONS PRESENTED FOR REVIEW.

1. Did the Supreme Court of Ohio violate the guarantees afforded to the petitioner, as a citizen of the United States, of a separation of powers between the Legislative and Judicial branches of the Government of the State of Ohio, under Article IV, Sec. 4 of the Constitution of the United States—

(a) By devising and promulgating a method of procedure for the hearing and determination of disciplinary complaints against attorneys, wholly contrary to and inconsistent with the procedure provided for the same purpose by statute?

(b) By promulgating a rule creating a Board of Commissioners on Grievances and Discipline, and declaring that all disciplinary complaints against attorneys must be filed with and must be heard only by

such board, contrary to and in violation of a statute of the State of Ohio providing that jurisdiction to hear and determine such complaints is conferred upon the Supreme Court, the Courts of Appeals and Courts of Common Pleas of Ohio, and providing for the filing of complaints with such courts and the method of trial of such complaints by such courts?

(c) By completely and effectively nullifying the statutes of Ohio providing the procedure for the filing of disciplinary complaints against attorneys, the hearing and determination of such complaints and the review thereof by appellate courts, while at the same time refusing to declare such statutes to be unconstitutional, void or beyond the power of the Legislature to enact?

(d) By incorporating in a rule of court creating a Board of Commissioners on Grievances and Discipline, a provision directing the assessment of costs against the petitioner in this case when the assessment of costs in Ohio is, and always has been, exclusively a matter of legislative jurisdiction; and by undertaking to assess against the petitioner in this case costs in the amount of $797.08, contrary to all existing statutes on the subject of costs and without any legal authority therefor.

2. Did the Supreme Court of Ohio deprive the petitioner of his constitutional rights, without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States—

(a) By requiring a disciplinary complaint against him to be filed with a Board of Commissioners on Grievances and Discipline, and by providing further that such board shall be vested with the exclusive right to hear witnesses and to receive evidence with respect to such complaints?

(b) By providing that the petitioner's appearance to defend himself against such complaint, as a matter of right, shall be before such board only and

not before any court or in the presence of any judge, excepting only as a matter of grace before the Supreme Court of Ohio for the purpose of objecting to the findings and the decision of the board?

(c) By providing that no person who is a member of the bar of the same county in which the petitioner practices law may sit in any hearing to receive evidence with respect to such complaint; and that evidence may be received only by persons who are not residents of the county in which the petitioner conducts his practice?

(d) By providing for a Board of Commissioners on Grievances and Discipline consisting of 17 members, and conferring upon such board the power to determine whether the petitioner was guilty of misconduct, but at the same time providing that the petitioner shall have the right to appear only before 3 members of that board and that the petitioner at no time may appear in person, or by counsel, before the Board of Commissioners, either prior to or after its determination of the complaint made against him.

(e) By confirming the grounding of a complaint against the petitioner upon a decision previously rendered by the Supreme Court of Ohio in a case which that court had no jurisdiction to hear or determine?

(f) By confirming disciplinary action against the petitioner recommended by the Board of Commissioners on Grievances and Discipline, upon the basis of a complaint which failed to inform the petitioner specifically of any act of misconduct with which he was charged, and which failed to charge the petitioner with the violation of any of the Canons of Ethics by which his conduct is governed?

(g) By setting up and defining as the basis of its judgment a standard of conduct required of the petitioner as an attorney at law, and a rule of law, which standard of conduct and which rule did not exist until pronounced by the court in this case; and

by applying such standard and such rule to acts of the petitioner which took place nine years earlier; and by virtue of such retroactive application divesting the petitioner of a valuable right and privilege, namely, the right to continue to practice law as a member of the bar of the State of Ohio?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

**Constitution of the United States:**

ARTICLE IV, Sec. 4—"The United States shall guarantee to every state in this Union a Republican form of government * * *"

AMENDMENT 14—"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Constitution of Ohio:**

ARTICLE II, SEC. 1—"The legislative power of the state shall be vested in a general assembly consisting of a Senate and House of Representatives * * *"

ARTICLE IV, SEC. 1—"The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may, from time to time, be established by law."

ARTICLE IV, SEC. 2, The Supreme Court—

"It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo and appellate jurisdiction in all cases involving questions arising under the Constitution of

the United States or of this state in cases of felony on leave first obtained, and in cases which originated in the Courts of Appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. * * * In cases of public or great general interest, the Supreme Court may, within such limitations of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the Court of Appeals."

ARTICLE IV, SEC. 4—

"The jurisdiction of the Courts of Common Pleas and of the judges thereof, shall be fixed by law."

**Ohio Revised Code:**

REVISED CODE SEC. 4705.02, Suspension or removal of an attorney—

"The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all the courts of the state. The clerk of court upon such suspension or removal shall send a copy thereof to the supreme court, the court of appeals, and to the federal court of the district in which said attorney resided at the time of trial for such action as is warranted. Judges of such state courts are required to cause proceedings to be instituted against an attorney, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal, or reprimand."

REVISED CODE SEC. 4705.03, Proceedings against attorney—

"Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel."

REVISED CODE SEC. 4705.04, Review of proceedings.

"In case of suspension or removal of an attorney at law by the court of common pleas, an appeal on questions of law may be had to the court of appeals, and the sentence of either the court of common pleas or the court of appeals, may be reviewed on appeal on questions of law in the supreme court. If such suspended or removed attorney shall desire a modification of the decree of suspension or removal, he shall file a written motion therefor in the court which entered such decree."

REVISED CODE SEC. 4705.05, Expenses and costs.

"The court in which charges or written motion is filed in accordance with sections 4705.03 and 4705.04 of the Revised Code, shall allow to the persons appointed to file and prosecute the charges, or to resist the modification of any decrees, for their services in either case, a reasonable sum, not exceeding one hundred dollars, to each person, together with the costs and expenses incurred by him in such proceedings. The amounts allowed shall be paid from the county treasury of the county wherein such proceedings are had, upon the warrant of the county auditor. If such charges or motion is filed in the supreme court, such allowances shall be paid from the state treasury."

## STATEMENT OF THE CASE.

The petitioner is an attorney at law, 55 years of age. He is a graduate of the Law School of Western Reserve University in Cleveland, and was admitted to the Bar of Ohio in 1931.

The alleged "misconduct" of the petitioner giving rise to this proceeding took place in 1949 when the petitioner was appointed by the Probate Court of Cuyahoga County in Cleveland as administrator of the estate of one William A. Wright.

The "misconduct" with which the petitioner has been charged does not involve the appropriation or misappropriation of funds, solicitation of business, or any of the acts of malfeasance or of misfeasance which generally constitute the basis of a complaint against a member of the bar.

The basis of the charge in this case is the failure of the petitioner to "report" to the Probate Court the receipt from a client of fees for services rendered by the petitioner. The client was the sole heir of the estate of which the petitioner was the administrator, and the fee was paid to the petitioner after the assets of the estate had been distributed to the heir.

William A. Wright died in February of 1949. The petitioner was notified of his death by four persons who were second cousins of the decedent and who were then his only known heirs. They agreed to the appointment of the petitioner as administrator of the estate. Subsequently the petitioner was contacted by one William Wright who claimed to be a first cousin of the decedent. As a result of efforts of the petitioner evidence was produced which established William Wright to be a first cousin and, therefore, the sole heir of the decedent under the law of Ohio.

A petition for determination of heirship was filed by the petitioner and the determination was made by the Probate Court upon the basis of evidence procured by the petitioner. The chief asset of the estate consisted of certain real property, and proceedings to sell that property were brought by the petitioner in the Probate Court pursuant to Ohio law. The property was sold and, after payment by the petitioner of bills and costs of administration, the entire amount remaining on hand was turned over to William Wright, the sole heir.

An agreement was made between the petitioner and the heir for payment to the petitioner by the heir of a stipulated fee. This fee, in the amount of $1444.84, was paid by the heir forthwith upon receipt of distribution to him of the assets of the estate.

The petitioner, as administrator, filed with the Probate Court a final account disclosing distribution of the entire estate to the heir. The account did not list receipt by the petitioner of any attorney fee; or of any payment from the estate except compensation as an administrator in the amount of $235.00, a sum which is fixed by statute and not subject to the discretion of the court. The judge to whom this accounting was made was Judge Nelson J. Brewer, then the only member of the Probate Court of Cuyahoga County.

More than four years after the final account had been filed, Judge Brewer's successor, Judge Walter Kinder, undertook the appointment of a committee to investigate this estate and caused a complaint to be issued against the petitioner charging him with fraud in failing to report the receipt by him of an attorney fee from William Wright, the sole heir of the estate. Mr. Wright himself made no complaint of any kind. He was contacted during the course

of the investigation, indicated that he was satisfied with the petitioner's services, satisfied with the fee he had paid, and had subsequently employed the petitioner in other matters.

Thereafter, Judge Kinder, who had instigated the complaint against the petitioner, held that he had been guilty of fraud upon the court and adjudged him to be in contempt. The petitioner appealed from that finding, and the Court of Appeals of Cuyahoga County, an intermediate appellate court, affirmed the Probate Court's decision with respect to an order directing the petitioner to refund to the estate the administrator's fee received by him, but reversed the Probate Court on its finding that the petitioner had been guilty of contempt.

In the Court of Appeals the petitioner's appeal was opposed by a "committee" of three attorneys who had been appointed by the Probate Court as amici curiae to represent the court on the appeal. The probate judge was not satisfied with the result of the appeal and instructed the three attorneys, who had been appointed by him as amici curiae, to prosecute an appeal to the Supreme Court of Ohio.

In accordance with these instructions, the three attorneys filed a motion in the Supreme Court to certify the record in the case, which that court granted. Thereafter, the Supreme Court of Ohio rendered a decision and a judgment in the case entitled, *In re Estate of Wright*, affirming in all respects the decision and the orders of the probate court. This decision of the Supreme Court of Ohio is reported in 165 O. S. 15, and is reproduced in the Appendix, pages 17a-30a, *infra*.

Thereafter, the decision of the Supreme Court of Ohio in the case of *In re Estate of Wright*, was made the basis for the complaint against the petitioner in the instant

proceeding. In its opinion in that case the Supreme Court of Ohio stated:

> "The cause is before this court by reason of the allowance of a motion to certify the record, which motion was filed by Jack A. Persky, Victor DeMarco and John R. Kistner, amici curiae, by appointment by Walter T. Kinder, Judge of the Probate Court of Cuyahoga County. No cross appeal was filed by appellee * * *"

Under the law of Ohio, no appeal can be instituted in any case by amici curiae. That fact was overlooked by counsel then representing the petitioner and apparently by the members of the Supreme Court as well, so that the case was argued before the court and decided by the court on its merits.

Subsequently, after the filing of the complaint in the instant case, a motion was filed with the Supreme Court of Ohio to vacate the judgment entered by that court in the matter of the estate of Wright. The motion pointed out that the court had no jurisdiction of that cause for the reason that there was no party appellant in the case, no party who had been aggrieved by the judgment of the Court of Appeals and no party in whose favor the Supreme Court of Ohio could act. The Supreme Court of Ohio refused to consider this motion on its merits, but entered an order declaring that it would be regarded as a second application for rehearing of the cause, and overruled the motion summarily.

Thereafter, a motion for reconsideration of the court's ruling was sought to be filed for the obvious reason that the petitioner was not seeking a rehearing of the cause before the court, but a dismissal thereof. The Supreme Court of Ohio instructed the clerk not to accept or to file the motion for reconsideration.

Thereupon, the petitioner prepared and forwarded to the clerk, for filing, a petition to vacate the judgment in the *Wright* case. Again the Supreme Court of Ohio instructed the clerk not to file the petition. The clerk of the Supreme Court mailed the petition, together with the deposit which had been tendered, not to counsel in the case but to the printing company.

Much disturbed by this arbitrary action of the court, counsel for the petitioner prepared another petition to vacate the judgment of the Supreme Court of Ohio for lack of jurisdiction in the *Wright* case, and made a trip to the state capitol for the sole purpose of seeing to it that the petition would be duly filed. Upon personal presentation by counsel, the clerk accepted and filed the petition; summons has been issued thereon; no answer or other action opposing the granting of the petition has been taken by anyone; the petition to vacate is still pending; and the Supreme Court of Ohio has to this date refused to hear the same.

Since the year 1824, consecutively for a period of 133 years, the law of Ohio establishing the procedure to be followed in connection with disciplinary matters involving attorneys was governed by statute. During that entire period the statutory procedure was substantially unchanged.

The statutes, which were in full force and effect when the complaint in this case was filed, provided that—

> "The Supreme Court, Court of Appeals or Court of Common Pleas, may suspend or remove an attorney at law from office, or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude."

"Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of the complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him."

In accordance with the statutory jurisdiction which existed for so long a period, it was the universal practice in the State of Ohio to file in the Common Pleas Court of the appropriate county any complaint which it was desired to bring before a court regarding the conduct of an attorney. And during the entire period of 134 years only one complaint was filed directly and as a matter of original jurisdiction with the Supreme Court of Ohio, and determined in the year 1909.

On December 5, 1956, the Supreme Court of Ohio announced the adoption of a new rule of court, designated as Rule 27, to become effective January 1, 1957. The rule, which is quite lengthy, and is printed in the Appendix hereto, pages 1a-15a, created a Board of Commissioners on Grievances and Discipline. The rule provides in part as follows:

"There is hereby created as commissioners of this court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings and submit recommendations to this court, as hereinafter provided, (a) concerning complaints of misconduct as hereinafter defined, which are alleged to have been committed by any attorney or counselor at law or judge * * *. Said Board of Commissioners shall consist of 17 members of the bar of this court, appointed by this court.

"The rule provides for the appointment of one member for each of 17 districts into which the state is

arbitrarily divided in connection with the operation of the affairs of the Ohio State Bar Association, a private bar association in the State of Ohio. Under this division made by the Ohio State Bar Association there is one district comprising one county only. The remaining 87 counties of the state are divided among the remaining 16 districts.)

"From and after the effective date of this rule, all proceedings for the investigation of complaints and grievances involving alleged misconduct by attorneys and counselors at law and judges, all proceedings for the discipline of such attorneys and counselors at law and judges, and all proceedings for reinstatement as an attorney and counselor at law, shall be brought, conducted and disposed of in accordance with the provisions of this rule. * * *

"All such complaints shall be filed in quadruplicate in the office of the Secretary of the Board of Commissioners.

"If said Board of Commissioners finds that the complaint upon its face does not charge misconduct, as herein defined, such complaint shall be dismissed, otherwise, said secretary forthwith shall cause a copy of such complaint to be sent by registered mail to the respondent named therein with a notice requiring him to file, within twenty days after the mailing of such notice, his answer in quadruplicate. * * *

"After respondent's answer has been filed, or the time has expired within which respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of commissioners appointed by the chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes."

The rule then provides that if the panel finds the respondent guilty of misconduct and desires to administer a private reprimand, this may be done without any right of appeal, review, or rehearing accorded to the respondent, and the finding of the panel becomes a permanent mark against the record of the respondent.

The rule further provides that if the panel finds that the respondent is guilty of misconduct and determines that a suspension or disbarment "is merited," the panel certifies its finding to the entire Board of Commissioners with the record of the testimony taken.

There is no provision in the rule for an appearance before the board of either the respondent or his counsel. In this case neither the respondent nor his counsel were permitted to appear before the board. There is no provision in the rule for the filing of a brief with the board, but in this case petitioner's counsel was permitted to file such a brief.

The rule provides that if the board determines that a public reprimand, suspension or disbarment is merited, the board shall—

> "Thereupon make a final certified report of such proceedings including its finding of fact and recommendations and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the clerk of this court, and shall forthwith notify the respondent and all counsel of record of such action * * *
>
> "Upon the filing of such final report by the Board of Commissioners, this court shall issue to the respondent an order to show cause before this court, at a time to be specified, not less than forty days after the issuance of such order, why the report of said

Board of Commissioners shall not be confirmed and a disciplinary order entered. * * *."

The respondent is then given an opportunity to file "objections" to the finding and the recommendation of the board and a brief in support of such objections. The rule then provides—

> "Upon failure of respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this court, this court shall enter such order upon the matter as it may find proper, which may include such provision for reimbursement of the actual and necessary expenses incurred by the Board of Commissioners in connection with such proceedings as the court shall deem just."

Under the provisions of this rule of the Supreme Court of Ohio, the action of the Board of Commissioners making a finding against an attorney and recommending suspension or disbarment, may be entered by only five members of the board. The rule provides—

> "A majority of the members of the Board of Commissioners, or of a hearing panel, shall constitute a quorum for all purposes, and the action of the majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel."

The meeting and the deliberations of the commissioners are not a matter of public record. Accordingly the petitioner is unable to state whether more than five of the seventeen members of the Board of Commissioners concurred in the finding and recommendation subsequently approved by the Supreme Court of Ohio.

Pursuant to the provisions of the foregoing rule, a complaint was filed with the Board of Commissioners on Grievances and Discipline by the Cleveland Bar Association. The entire complaint is as follows:

> "Now comes the Cleveland Bar Association, the relator herein, and says that Henry H. Pleasant, the respondent, has been guilty of misconduct within the meaning of Rule 27, par. 5 of the Supreme Court of Ohio, as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15. Wherefore, relator prays that the respondent be served with notice of this complaint and a hearing be held within the terms of Rule 27 of the Supreme Court of Ohio."

Paragraph 5 of Rule 27 referred to in the foregoing complaint is quoted in full herewith—

> "Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics, or the Canons of Judicial Ethics, as adopted by the court from time to time, or the commission or conviction of a crime involving moral turpitude."

The case filed against the petitioner herein was the first case to be filed with the Board of Commissioners on Grievances and Discipline, and was docketed as case No. 1 on the Disciplinary Docket of the Supreme Court of Ohio.

The petitioner moved to dismiss the complaint upon the ground that the board had no jurisdiction to consider or to determine the same. In support of that motion the petitioner raised, among other important legal questions, all of the constitutional questions affecting the validity of the composition and the existence of the board, and the validity and the constitutionality of the rule which created that board which are presented herewith.

In order to preserve all rights to which he was entitled under the law, the petitioner declined to submit himself voluntarily to the jurisdiction of the board. The board, however, refused to consider or to determine the petitioner's motion to dismiss the complaint until after a panel had been selected, notice of hearing issued and the hearing had actually begun.

Following the formal opening of the hearing of the complaint filed against the petitioner, the panel announced that petitioner's motion to dismiss the complaint for lack of jurisdiction in the Board of Commissioners was overruled "so far as it was within the authority of the panel to overrule it."

At this point the petitioner pointed out to the panel that the complaint itself was insufficient, since the provisions of Revised Code of Ohio, Sec. 4705.03 required the filing of written charges "stating distinctly the grounds of complaint."

Petitioner pointed out that the complaint in this case was couched in the most vague and general terms, to wit—"that the respondent has been guilty of misconduct within the meaning of Rule 27, par. 5 of the Supreme Court of Ohio"; that Rule 27 par. 5 defined misconduct as any violation of any provision of the oath of office taken upon admission to the practice of law in Ohio, or any violation of any of the Canons of Professional Ethics.

It was pointed out to the panel that the complaint did not state whether the petitioner was being charged with a violation of his oath as an attorney and, if so, what part of the oath, and did not state whether the petitioner was being charged with a violation of the Canons of Professional Ethics, the same being 36 in number and, if so, which one or more of the Canons of Ethics the petitioner was charged with having violated.

It was pointed out to the panel that the petitioner was charged with "misconduct," "as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15," and on the face of the complaint it was the opinion of the court, reported at the place cited, which constituted the apparent basis of the charges against the petitioner, that this opinion was eleven pages in length, and that the petitioner was entitled to be advised specifically what portion of the opinion the charges were intended to refer to, and particularly what portion of the opinion was claimed by the Bar Association to state a violation of either the oath of office or some particular Canon of ethics.

It was pointed out to the panel that the failure to specifically advise the petitioner of the charges against him in the manner requested, constituted a failure to comply with the requirements of due process of law. Accordingly, a motion was submitted to the panel that the complaint be ordered to be made more definite and specific, in conformity with the statutory law of Ohio and the requirements of due process of law. This motion was summarily overruled by the panel and the hearing was ordered to proceed forthwith.

From the evidence offered by the Bar Association, it appeared that the misconduct with which the petitioner was charged was the failure of the petitioner to "disclose" or to report to the court, as a part of his account as an administrator, the fee which had been received by him from the sole heir of the estate after the distribution to such heir of the assets of the estate.

This failure on the part of the petitioner was alleged to have constituted a "fraud" upon the court, notwithstanding the fact that no application to the court was made by the petitioner for the payment of any sum whatsoever, and no demand was made on the court for the payment of any additional sum.

In its opinion in the case of *In Re Estate of Wright*, 165 O. S. 15, at p. 23, the Supreme Court of Ohio stated—

> "It is a fundamental principle of law that, where parties having different interests are involved, no lawyer can represent or receive compensation from such parties without a full disclosure, to all the parties involved, of his dual representation and the arrangements as to the compensation to be received therefrom. Every lawyer, worthy of the name, learns this principle ab initio. In fact, it is indicated in the oath of office he takes upon his admission to the bar. It follows that, where one is acting as an administrator of an estate, his sole duty is to its proper administration, and he cannot properly have an arrangement to represent a claimant against the estate without a full disclosure of such arrangement to the court and to all persons concerned in the estate, not only as to the terms of the arrangement but as to the compensation he is to receive therefrom.
>
> "Where one accepts an appointment as administrator of an estate, he represents that he has no arrangement for compensation with anyone concerned with the estate, in the absence of a full disclosure concerning such arrangement and the consent of all interested parties thereto. Certainly, such a representation relates to a material existing fact, and, if he is violating his duty, a lawyer making such representation knows of a falsity. Necessarily, the representation is intended to be relied upon and the court in relying upon it almost inevitably makes orders, such as to fees paid from the estate, which it, in all probability, would not do had a full disclosure been made to it.
>
> "If we must abide, as we do, by the findings of facts by the trial thereof and as sustained by the Court of Appeals, we necessarily must sustain the finding of fraud upon the court by appellee."

The evidence which was presented to the Probate Judge in the *Estate of Wright* upon the proceeding in-

stituted at the request of the Judge himself, and which gave rise to the finding of facts by the Probate Judge by which the Supreme Court of Ohio declared it "must abide," was very different in its most essential aspects from the evidence presented upon the hearing of the complaint instituted by the Cleveland Bar Association.

Since neither the sole heir, who had paid to the petitioner attorney fees for services rendered by him, nor the remaining relatives of the deceased, William A. Wright, nor any other person claimed to have been defrauded in any respect whatsoever by the petitioner, and since the basis of the charge advanced by the Cleveland Bar Association was conduct of the petitioner which had been found by the Supreme Court of Ohio to constitute a fraud upon the Probate Court, in this proceeding the petitioner undertook to offer as a witness on his behalf not only the Probate Judge who was in office at the time the Wright estate was being administered, but his principal deputies who were concerned with the accounting made and filed by the petitioner in the Wright estate.

The Probate Judge testified that any attorney had a right to make an arrangement with an adult client who was the sole heir of an estate for payment of such fee as they might agree upon; that such an arrangement was of no concern to the Probate Court; that he, as Probate Judge, was not interested in being informed of such arrangement; nor was he, as Probate Judge, concerned with its being carried out. The Judge testified that in his opinion there had been no improper concealment of facts from the court in the administration of the Wright estate and no fraud committed upon the court.

The judge's deputies who were in the employ of the court at the time the Wright estate was being administered and who were still in the employ of the court at the time

their testimony was given, testified unequivocally that it was common and accepted practice upon the part of lawyers in Cuyahoga County to make no report or disclosure to the court of fees which had been paid to them directly by clients, whether heirs or other persons interested in the administration of estates.

These witnesses testified that while this practice was not universal, and while some lawyers did make a report and disclosure of fees received in this manner, neither they nor any of the court's employees were interested in or concerned with the payment or the receipt of such fees.

They further testified that there was no rule of court which required counsel to report the receipt of such fees by counsel. And it was taken for granted upon the hearing of the complaint filed by the Cleveland Bar Association in this case that there was no statute or law in effect in the State of Ohio which required such a disclosure.

At no time either during the entire proceedings in the *Estate of Wright*, from its inception in the Probate Court to its culmination in the Supreme Court of Ohio, and at no time during the hearing of the instant complaint filed by the Cleveland Bar Association, was there a statement or opinion voiced by anyone that there was any statute in existence in the State of Ohio requiring such disclosure to be made.

Since it was clear that the petitioner in this case could not be charged with a violation of his oath of office and could not be charged with the violation of a Canon of Ethics, if his failure to disclose the fee paid to him was not in violation of any statute, rule or legal requirement, and since the evidence in this case disclosed beyond question that there was no such rule in existence requiring him to make such disclosure to the Probate Court, the Supreme Court of Ohio, when this matter came before it, was under

the necessity of finding some basis for upholding a charge of misconduct made against the petitioner based upon his failure to disclose.

In its opinion in the case of *Bar Association vs. Pleasant*, 167 O. S. 325, at p. 333, the court said—

> "As to objection No. 2, Pleasant strenuously contends that the panel and the courts have assumed that there was a rule of the Cuyahoga County Probate Court requiring an attorney to report an attorney fee, and that the testimony demonstrates there was no such rule.
>
> "Assuming that such rule did not exist, there is a statute in Ohio, Sec. 2113.36, Revised Code (Sec. 10509-193, General Code), which reads in part as follows:
>
> > '* * * When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may, at any time during administration, fix the amount of such fees and, on application of the executor or administrator, or the attorney shall fix the amount thereof. * * *.'
>
> "It is obvious that the law of Ohio contemplates that the attorney fees in the administration of an estate shall be allowed and determined by the Probate Court, and if they are to be paid under a contract with an heir of the estate, who is being represented by the administrator as attorney, such arrangement shall be disclosed to the Probate Court, not only because of the statute above referred to, but as a protection against any overreaching."

The interpretation of R. C. Sec. 2113.36, previously known as G. C. Sec. 10509-193, which was made by the Supreme Court of Ohio in this case, had never previously been made or announced by that court or any other court

in Ohio, and no prior decision of that, or of any other court in Ohio was cited by the Supreme Court in its opinion.

Based upon its interpretation of this statute, the court stated in its opinion, 167 O. S. 325, 332:

> "Pleasant, as the administrator, was entitled to represent himself as administrator and was likewise entitled to receive an allowance for legal services, both ordinary and extraordinary, but, nevertheless, such services should be paid for either by allowance by the Probate Court, or after a full disclosure to the court as to any private arrangement he had with an heir of the estate to pay for such services. That he was found to have committed fraud upon the Probate Court was based upon the fact that he failed to disclose to the court or to anyone else, except the person who had signed the contract with him, his arrangement to receive forty per cent of the estate."

Accordingly, the court overruled all objections of the petitioner to the findings and recommendation of the Board of Commissioners on Grievances and Discipline. In these findings and its recommendation, the Board found that the petitioner had been appointed administrator of the Wright estate, that he also acted as attorney for the estate, that at the same time he represented as attorney William Wright, later determined by the court to be the sole heir of the estate, who is referred to by the Board in its findings as a "claimant."

The Board found that the petitioner had failed to make a "disclosure" to the Probate Judge of his representation of William Wright and of the fee received by him from William Wright and concluded:

> "The respondent, as a result of his conduct with reference to said estate, was, as a matter of record, found guilty of perpetrating a fraud upon the Probate

Court of Cuyahoga County, which finding remains unreversed and unmodified.

"Respondent violated the statutory requirements provided for in Sec. 10509-193, Ohio General Code (Sec. 2113.36 Ohio Revised Code), relative to the further allowance of counsel fees to be a charge against an estate.

"The respondent violated the established practice in the Probate Court of Cuyahoga County relative to the procedure pertaining to the allowance of counsel fees to be charged against an estate.

"It is therefore the determination of the Board of Commissioners that the respondent, Henry H. Pleasant, has violated Sec. 30, Rule 27 on disciplinary procedure of the Supreme Court of Ohio. The respondent is guilty of misconduct in that he violated his oath of office and the Canons of Professional Ethics, more particularly, Sections 6, 29, 32 and 38 of said Canons."

An application for rehearing of the Supreme Court's judgment was denied.

## ARGUMENT.

### Summary.

In this proceeding the Supreme Court of Ohio, for the first time, required the filing, the hearing and the determination of a complaint against a member of the Bar of Ohio to be carried out in accordance with the provisions of a new rule adopted by that court relating to the discipline of lawyers.

In enforcing this procedure, the Supreme Court of Ohio effectively nullified the provisions of Ohio statutes which are still in force, and effectively ousted the jurisdiction of the Common Pleas Court of the county in which the petitioner was engaged in practice as an attorney and before which, in accordance with the universal practice of

Bar Associations throughout the State of Ohio, the complaint against the petitioner would otherwise have been filed.

The rule itself violates basic and elementary requirements of a fair hearing and of due process of law. In a situation in which an attorney may be permanently deprived of his right to continue to practice his profession which he has achieved only at great expense and after many years of effort, he is deprived of the right to appear in person before the Board which is vested with the authority to pass upon and to effectively determine his fate. These and other basic deficiencies in the rule resulting in its invalidity will be discussed.

The power and authority of the Supreme Court of Ohio to adopt the rule is challenged. The right of the court to subject attorneys at law to procedure which is wholly different from and inconsistent with the procedure provided by law in Ohio governing attorneys as well as all other professional persons, is challenged.

The authority of the court to suspend the petitioner's right to practice law in Ohio under the circumstances of this case is challenged when it is grounded upon conduct of the petitioner which was in all respects regular and proper in the view of the judge who is alleged to have been "defrauded," and who was the only one concerned with the petitioner's conduct.

The authority of the court to adopt an interpretation of a statute and to apply it retroactively to the petitioner's conduct is challenged when such interpretation was unknown to the law, to the Bar, or to the courts at the time the petitioner's conduct took place.

The fact is noted that there is no claim of overreaching or overcharging by the petitioner in this case. The fact is noted that the fee paid directly to the petitioner after dis-

tribution of the assets of the estate is not claimed to be unreasonable. The fact is noted that no intent to defraud anyone is charged against the petitioner and that no actual resultant fraud upon any person is charged against the petitioner.

The fact is noted that the procedure applied to the petitioner in this case will hereafter be applied to all complaints made or prosecuted against all members of the Bar of the State of Ohio in any situation, and that the members of the Bar of the State of Ohio in each such instance will be subjected to all of the deficiencies of the court rule and to its lack of fairness, and to the failure of the rule to comply with the requirements of due process of law with which the petitioner in this case has been faced; and that there is no authority other than this Court to whom an appeal can be made for remedy or redress of such grievances.

**The Separation of Powers in Ohio.**

The framework of the government of Ohio follows the basic separation of powers adopted in the Constitution of the United States as the republican form of government guaranteed to all citizens of the United States in their respective state governments.

As in the constitution of the United States, the residual powers of government have been retained by the people of Ohio, through their constitution, which provides, Article I. Sec. 20:

> "This enumeration of rights shall not be construed to impair or to deny others retained by the people; and all powers, not herein delegated, remain with the people."

As between the legislative and the judicial branches of the government of Ohio, the people of Ohio have designated the legislative branch of the government as superior.

Provisions of the constitution of Ohio, enactments of the state legislature and the traditional history of the separation of powers in the state, have vested the General Assembly of Ohio, the legislative body of the state, with supervision and control over the exercise by the judicial branch of almost every power required by the judiciary for the operation of its functions and the administration of justice by the courts of the state.

This supervisory control over the judicial branch of the government by the legislature has, throughout the history of the state of Ohio, become an integral part of the republican form of government in Ohio. And it is a republican form of government within this framework, as set up by the people of the state and administered for more than 150 years, that is guaranteed to the people of the state of Ohio and for the benefit of the people, by the provisions of Article IV, Sec. 4 of the Constitution of the United States.

It is the separation of powers between the legislative and judicial branches of the state of Ohio within this framework which the Supreme Court of Ohio has undertaken to rupture by an act which is contended to be utterly beyond the power and the authority of the Supreme Court of Ohio, and in violation of the constitutional rights of the people of this state. Article II, Sec. 1, of the Constitution of Ohio vests the entire legislative power of the state in the General Assembly:

> "The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives * * *."

There is no limitation whatsoever upon this "legislative power" other than those incorporated in the constitution of the state and dealing with specific subjects of legislation.

Except for these specific limitations, it is within the constitutional competence and authority of the legislature to enact laws dealing with any subject whatsoever which may be regarded by the General Assembly as in the interest of the people of the state and which do not contravene a specific provision of the constitution of the state.

The first constitution of Ohio was adopted in 1802, one year prior to the admission of the state as a member of the Union. That constitution conferred upon the General Assembly the same broad legislative power as did the second and existing Constitution adopted in 1851.

For over 100 years every phase of practice and of procedure in the courts of Ohio has been regulated by the legislature. From the kind and the form of pleadings to be filed in a trial court, through the nature and the method of reception of evidence, the supervision of the judge over the trial of the cause, the manner and the method of the entry of judgments, the nature of, the limitations upon, and the effect of appeals—at every step, it is the hand of the legislature which guides and directs and governs and imposes the will of the people upon the judges in the minutest exercise of their judicial functions.

There is not now, and there has not been in the entire constitutional history of the state, any departure from the exercise of this control by the legislative branch of the government over the judicial. Consonant with the authority vested in it, the General Assembly of Ohio undertook from the earliest times to prescribe not only the grounds upon which members of the bar of the state could be disciplined or suspended, or removed from the roll of attorneys, but the General Assembly provided the procedure by means of which such action could be instituted, determined and concluded.

In 1824 the General Assembly enacted a statute which is the forerunner of the present statutes of Ohio on this subject, and the procedure provided by the enactment of 1824 is substantially that to be found in the present laws. From time to time the legislature adopted amendments to the original statutes dealing principally with the grounds on the basis of which complaints against lawyers could be instituted. In general, through a series of such amendments, grounds for disbarment and suspension of lawyers have become more restricted by statute in Ohio; but the procedure provided by the legislature has remained substantially unaltered. And it is one of the distinctive and vital steps in a procedure provided by statute that jurisdiction to receive and to determine complaints against members of the bar is conferred by statute upon not only the Supreme Court of the state, but upon the Courts of Common Pleas as well. Article IV, Sec. 4, of the present (1851) Constitution of Ohio, provides that:

> "The jurisdiction of the courts of common pleas and of the judges thereof shall be fixed by law."

Pursuant to that provision of the constitution, the General Assembly continued in effect the statute which had been in existence since 1824. Now known as Sec. 4705.02, Revised Code, formerly Sec. 1707, General Code, it provides:

> "The Supreme Court, Court of Appeals, or Court of Common Pleas, may suspend or remove an attorney at law from office, or may give private or public reprimand to him, as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or for conviction of a crime involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all courts of the state."

In sections of the Code immediately following, the legislature has provided the procedure for the filing of complaints against attorneys in the Court of Common Pleas and other courts, and for the method of hearing and determining such complaints.

There is no provision in the Ohio constitution concerning attorneys and there is no inhibition in the constitution of Ohio barring or limiting the authority of the legislature to deal with the subject of attorneys, just as there is no provision to be found in the constitution of Ohio barring or limiting the power of the legislature to control, in the minutest degree, practice and procedure in the courts of the state. Accordingly, there is a long standing set of valid statutes completely covering the subject matter of attorneys and the practice of law, dealing with admission to practice, discipline, removal, review, liability in certain cases, the practice of law and the punishment by fine for unauthorized practice of law.

**Prior Ohio Court Decisions on Attorneys and the Practice of Law.**

In many decisions prior to the instant case, the Supreme Court of Ohio has recognized and applied the procedural provisions of the Ohio statutes relating to complaints against members of the bar. In those decisions, the Supreme Court has referred to the procedural provisions of the statutes as mandatory and has recognized that they are binding upon the court.

In 1923, in the case of *In Re Hawke*, 107 O. S. 341, 140 N. E. 583, the court stated categorically in its opinion:

> "It is urged, however, that the *courts* have an inherent right to disbar or suspend attorneys at law from the practice of their profession, and that, therefore, they are in a measure an exception to the general rule as to other licensed persons. We do not

understand that *when the legislature confers a right upon a citizen of Ohio* any court has an inherent right to arbitrarily, or *for any cause other than that enumerated in a statute* deprive such person of such right, *even though he be an attorney at law who is a quasi member of the court.*

"Courts always have had and must have the power to hear and determine contempts of court and to fine persons, even attorneys at law, guilty of such contempt, and they may impose penalties that are at least the equivalent of temporary suspension from the practice; **but they may not, as an inherent right, disbar an attorney at law, when that right has been conferred by a statute.**

"Attorneys at law are and should be governed by the same constitutional provisions touching the jurisdiction of courts as are other persons and professions."

The next pronouncement by the Supreme Court of Ohio on this subject appears in the opinion of the court in the case of *State ex rel. Levy vs. Savord, Judge*, decided in 1944, 143 O. S. 451, 55 N. E. 2d 735:

"*Under the provisions of Sec. 1707, General Code, express jurisdiction is conferred on the Court of Common Pleas* to suspend or remove an attorney at law from office, or to take other disciplinary measures of less severity, for specified causes."

In 1949, the Supreme Court stated in its opinion in the case of *State ex rel. Joseph vs. Crossland, Judge*, 152 O. S. 199, 88 N. E. 2d 289, with reference to the procedural provisions of the disciplinary statutes:

"The above quoted provisions of Section 1708, General Code are mandatory."

and further in the same opinion:

"*The requirements of disbarment statutes are to be strictly construed in favor of one against whom charges are filed.*"

As recently as 1955, the Supreme Court declared in the syllabus of the case of *In Re Lieberman*, 163 O. S. 35, 125 N. E. 3d 328:

> Syl. 1—"*A proceeding to suspend or remove an attorney at law from office is strictly statutory.*"

The choice of the language "strictly statutory" with reference to proceedings in disciplinary actions against lawyers, unquestionably reflected the established law in the State of Ohio for a period of what then amounted to 131 years.

**Question of the Inherent Powers of a Court with Respect to Attorneys.**

It was not until the policy of the people of the State of Ohio, with respect to the admission of attorneys to the practice of law, grounds upon which proceedings for suspension or disbarment could be maintained and the method of procedure to be followed in such cases, had been established by the people through legislative action and maintained continuously for a period of 85 years, that the Supreme Court of Ohio first alluded to what it termed its "inherent" powers in this field in 1909. In the case of *In Re Thatcher*, 80 O. S. 482, 89 N. E. 39, the court held:

> "Syl. 1—The Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the bar.
>
> Syl. 2—The provisions of Sec. 563 Revised Statute are not an attempted enlargement of the jurisdiction of the several courts therein named, in contravention of the constitution, but are regulatory provisions recognizing already existing powers of the courts."

During this entire period of 85 years, and until the pronouncement of the Supreme Court of Ohio in the

*Thatcher* case, there had never been a single hint or a supposition that the people of the state of Ohio were without power to adopt and to fix the policy of the law in Ohio through the legislative branch of their government with respect to the admission to practice, the suspension and disbarment of attorneys. Until the pronouncement in the *Thatcher* case there had never been a hint or supposition that the statutes which had been in effect for almost a century, were simply "regulative provisions recognizing already existing powers of the courts."

It had always been considered that the statutes defined and proclaimed the law of the state of Ohio on this subject. However, in 1909 the Supreme Court of Ohio was not yet ready, apparently, completely to disregard or *to nullify the* provisions of the statutes, nor was it yet ready to assume that it, the Supreme Court of Ohio, had the right to assume sole and exclusive jurisdiction in this field and to oust the jurisdiction with which the statutes of the state endowed other courts. The Supreme Court then merely declared in its opinion:

> "Numerous authorities, English, federal and state assert such jurisdiction as inherent in every court of record as a necessary incident of its organization as a court, and that it specially, although not exclusively, results from the power to admit to the bar, and that such original jurisdiction exists even in courts of appellate jurisdiction."

Thus, the Supreme Court in the *Thatcher* case recognized that such inherent power as it might have belonged not alone to the Supreme Court, but was—

> "inherent in every court of record as a necessary incident of its organization as a court."

The court further pointed out that this "inherent power" "exists even in courts of appellate jurisdiction."

In line with this pronouncement of the Supreme Court in 1909, the Court of Appeals of Cuyahoga County, embracing the territory of the City of Cleveland, declared in a disbarment proceeding brought in 1917, *In the Matter of Edward P. Strong*, 27 O. C. C. n.s. 257, 29 O. C. D. 81, that—

> "We conclude, on this point, that we have jurisdiction of the subject brought before us in the proceeding, inherent in our court and not needing the aid of any written or formal law to call it forth and set it in motion towards such mode or measure of redress or remedy as may commend itself to a fit discretion in our exercise of the power so existing."

It should be pointed out that long after the statutes relating to the disbarment of attorneys had been enacted by the legislature, an amendment to the constitution of Ohio was adopted in 1912. That amendment fixed and defined the limits of all jurisdiction of the Courts of Appeals of Ohio, both original and appellate, and the Court of Appeals in the *Strong* case accordingly concluded that the statutes which had so long been in effect could no longer confer on that court original jurisdiction in a disbarment proceeding, which had not been conferred under the provisions of the constitution.

It is perhaps further significant to note that this situation was brought to light by the court itself; that both the prosecuting committee of attorneys and counsel for the respondent attorney were of the opinion that the provisions of the statutes were still effective:

> "The proceeding is prosecuted under the supposed authority of Sec. 1707 of the General Code, which purports to confer on this court jurisdiction to forbid the accused to practice law in all of the courts of the state, if found guilty of either misconduct in his office

of an attorney, or unprofessional conduct involving moral turpitude.

* * *

"Before proceeding to the consequent step of meting out the adequate penalty to be annexed to the respondent's breach of duty as an officer of the courts of Ohio—including this court—we have thought it fit to examine, with some care, the basis of our power to act in the matter at all, and the source and extent of the jurisdiction of this court in this proceeding. The question was not raised in argument, but it is in the case—to a considerable degree decisively—and we must deal with it accordingly.

"Before the adoption of the amended Constitution of 1912, the General Assembly of Ohio had large discretionary powers to confer jurisdiction upon the courts of the state, including the predecessor of this court. But since that constitution became effective, the former legislative source of jurisdiction as to this court is cut off and wholly denied. To find what the jurisdiction of this court is, in any case one must go behind the statutes and look to the Constitution itself. * * *

"The statute, therefore, which is relied on to direct us to give judgment in this case, is altogether inert and without power to do so. * * * In this very proceeding a possible want of power on our part to determine the matter seems not to have occurred to the able counsel on either side; for no such infirmity is suggested."

Accordingly, the Court of Appeals in the *Strong* case was obliged to find that it had no jurisdiction to consider the original disbarment complaint brought before it in that case, unless it had, as it determined, that inherent power to consider and to determine the complaint which the Supreme Court of Ohio in the *Thatcher* case declared to

exist "in every court of record as a necessary incident of its organization as a court."

The next pronouncement of any Ohio court concerning the inherent powers of the courts in this field, is found in the opinion of the Supreme Court of Ohio in the case of *In Re Hawke*, referred to above, page 31, 107 O. S. 341, 140 N. E. 583. In that case the Supreme Court expressly recognized the fact that the right to practice law in Ohio was a right which had been conferred, not by the court, but through the legislature of the State of Ohio by statute. In its opinion, also referred to above, pages 31-32, the court declared:

> "We do not understand that when the legislature confers a right upon a citizen of Ohio any court has an inherent right to arbitrarily, or for any cause other than that enumerated in a statute, deprive such person of such right even though he be an attorney at law who is a quasi member of the court."

And in the same opinion the court added, after discussing the inherent power of the court in the field of contempt, that—

> "Courts * * * may not, as an inherent right, disbar an attorney at law when that right has been conferred by a statute."

referring to the right of the attorney to practice law in the State of Ohio; and the court concluded in the *Hawke* case that:

> "Attorneys at law are and should be governed by the same constitutional provisions touching the jurisdiction of courts as are other persons and professions."

It is submitted that these pronouncements by the Supreme Court of Ohio in the *Hawke* case constitute a declaration of the principles of law in this field which had

been in effect in Ohio for a period of precisely 100 years at the time the *Hawke* case was decided.

These pronouncements continued as the law of Ohio for 33 years more, until in 1956 the Supreme Court of Ohio decided the case of *In Re McBride*, 164 O. S. 419, 132 N. E. 2d 113. In that case, for the first time in a period of 132 years, the Supreme Court of Ohio found that it was not obliged to follow the provisions of the Ohio statutes expressly defining the grounds upon which an attorney could be suspended or disbarred, and that the policy of the people of the state of Ohio, as fixed by the legislative branch of the government, could be disregarded under the guise of a newly discovered "inherent power."

In the *McBride* case, the court declared:

Syl. 1—"The power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, rests inherently in the judicial branch of the government."

Syl. 2—"The legislative branch may provide by statute standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend or otherwise discipline attorneys for specified causes, but such legislation is to be interpreted as an aid to and not as a limitation on the power of the judicial branch in these respects."

Syl. 3—"Statutes authorizing the disbarment, suspension or discipline of attorneys on stated grounds do not operate as a restriction on the general power of courts over attorneys, who are their officers, to disbar, suspend or otherwise discipline them on grounds other than those specified by statute."

Syl. 4—"The inherent powers of courts to disbar, suspend or otherwise discipline attorneys are not affected by recognizing and following the regulations and practice prescribed by statute on the subject."

Accordingly, in the *McBride* case the Supreme Court of Ohio undertook completely to disregard a provision of the statutes which had been incorporated therein by amendment many years earlier limiting the power of the courts to suspend or disbar attorneys to cases of misconduct on their part involving moral turpitude.

A petition for a writ of certiorari from this Court was filed in the *McBride* case but denied, 351 U. S. 965, 76 Supreme Court 1030.

Whatever was said by the Supreme Court of Ohio in the *McBride* case concerning the method and procedure provided by statute in disbarment matters was purely dicta, but the court at least recognized again the regulatory powers of the legislative branch of the government over the exercise of its own powers by the judicial branch of the government.

In its opinion in the *McBride* case, the court stated:

"True, in the case of In Re Lieberman, 163 O. S. 35, 38, 125 N. E. (2d) 328, 330, it is said that

> 'A proceeding to suspend or remove an attorney at law from office is strictly statutory.'

but we see nothing inconsistent or incongruous in following the mechanics and mode of procedure provided by statute for the initiation and conduct of proceedings for the reprimand, suspension or removal of attorneys and at the same time enlarging the statutory grounds for such action by the exercise of the inherent powers possessed by courts in these matters."

Even in the *McBride* case therefore the Supreme Court of Ohio recognized that the *procedure* which was required to be employed in disbarment matters was still "strictly statutory," as the court had declared in the *Lieberman* case decided only the previous year. But this recog-

nition of the authority of the legislature to establish procedure, which had previously been declared both mandatory and strictly statutory in disbarment matters, was not long lived so far as the present members of the Supreme Court were concerned.

In the very same year, 1956, in which the *McBride* case was decided, the court promulgated its amended Rule 27 set forth at p. 1a in the Appendix hereto, creating a Board of Commissioners on Grievances and Discipline and declaring that this board was vested with exclusive jurisdiction to hear and to determine all complaints wherever arising against any member of the bar of the State of Ohio.

By so doing, the Supreme Court, of course, nullified, or, at least, has attempted to nullify, the statutory jurisdiction of all courts of common pleas of Ohio; the court has nullified, or has attempted to nullify, the procedural provisions of the statutes relating to all complaints against members of the bar, in whatever court such complaints might be instituted pursuant to said statutes. And, when objection was voiced in the instant case to this assumption of authority upon the part of the court, which is believed to be arbitrary, unconstitutional and without any foundation in law to support it, the Supreme Court of Ohio curtly stated in its opinion in this case:

> "Obviously, the whole matter with reference to the power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, has been settled in the case of In Re McBride, supra. * * *
>
> "There can be no question now of the inherent power of this court as to the disciplining of attorneys and, therefore, of its power to provide by rule the procedure in reference to hearings upon such question. That is all that was contemplated in the establishment of the Board of Commissioners on Grievances and Discipline."

No effort was made by court in this case to overrule its prior decisions declaring the procedure provided by the legislature to be mandatory, and declaring that the procedure be followed in disbarment matters was strictly statutory. No reference was made by the court to its pronouncement in the *McBride* case recognizing the regulative authority of the legislature over the exercise of the powers of the judiciary. And in answer to the unanswerable statement that Rule 27 of the Supreme Court has completely ousted the courts of common pleas of the state from jurisdiction conferred upon them by statute, the court stated:

> "The contention that the Supreme Court cannot deny the inherent power of courts of common pleas with reference to disciplinary actions against attorneys would be a matter of concern if that question were before us. However, since the present case is one in which only the inherent power of the Supreme Court to discipline an attorney is concerned, and since Rule 27 only concerns itself, so far as the matter is now before us, with the procedure for exercising disciplinary action before this court, we are impelled to hold that there is nothing unconstitutional about the rule so far as it applies to the present case."

Consider, please, the manner in which the Supreme Court of Ohio has attempted to avoid, in its decision in this case, a vital question of arbitrary and unconstitutional assumption by it of the power to nullify completely the provisions of legislation which has been in effect in Ohio for 134 years. In effect, the court has stated to the petitioner in this case:

> "We recognize the existence of the statute which confers jurisdiction upon the Court of Common Pleas of Cuyahoga County to hear and to determine the complaint made against you by the Cleveland Bar Association.

"We recognize that no complaint filed against any lawyer in Cuyahoga County by either bar association in that county has ever heretofore been filed directly with this court, and that with a single exception all such complaints have been filed before the Common Pleas Court of Cuyahoga County pursuant to the provisions of the existing statute.

"We recognize the fact that by the rule which we have adopted, we have ordered the Cleveland Bar Association, as well as all other bar associations within this state, to file all complaints against lawyers with the Board of Commissioners which we have appointed.

"We recognize that the Cleveland Bar Association has filed a complaint against you in this case before the Board of Commissioners, in accordance with the order which this court has issued.

"We recognize that but for such order, the Cleveland Bar Association would undoubtedly, have filed its complaint with the Court of Common Pleas of Cuyahoga County in accordance with the prior universal practice.

"We recognize the fact that all bar associations in the state are expected to obey the rule which this court has issued and to file all complaints with the Board appointed by this court.

"We recognize the fact that all courts of common pleas of this state are expected to obey the rule which this court has issued and to decline to hear and to determine any complaints against members of the bar of this state.

"We recognize that in effect the procedural provisions of the statutes of Ohio have been nullified by our rule.

"Nevertheless, you are not aggrieved by the order which we have issued to the Cleveland Bar Association to file its complaint with the Board which we

have appointed. You are not aggrieved by the failure of the Cleveland Bar Association to follow the statutory provisions relating to procedure, which would have been followed by that association except for the rule which we have adopted. You are not aggrieved by the failure of the Cleveland Bar Association to file its complaint against you with the Court of Common Pleas of Cuyahoga County, which would have been done except for the rule which we have adopted.

"You are not aggrieved by your inability under the provisions of our rule to appear, both personally and by counsel, in the presence of the Court of Common Pleas of Cuyahoga County, which you would have had a right to do under the provisions of the statutes of Ohio, except for the mandatory provisions of the rule which we have adopted.

"Accordingly, you may not raise in this case any question concerning the nullification by our rule of the procedural provisions of the Ohio statutes, and that matter is not now before us in this case."

If it is possible to do so without intending to be disrespectful to the Supreme Court of Ohio, or intemperate in our characterization of the conduct of that court, we should like to say that the action of that court in refusing to pass upon the federal constitutional question directly involved in this case, appears to us to be arbitrary and indefensible.

The Supreme Court of Ohio, through the rule which it adopted, has utterly destroyed the procedural rights accorded to the petitioner under the provisions of the Ohio statutes, as effectively as it could do if it had the power to repeal the statutes and had exercised that power. By its statement that the question which is here raised is not before it in this case the Supreme Court of Ohio is attempting to place itself in an invulnerable position with respect to the question here raised, since the court well

knows that no bar association in the State of Ohio will undertake to disobey the rule of the court, and no Court of Common Pleas of the State of Ohio will undertake to disobey the rule of the court. Therefore, in the view of the Supreme Court of Ohio the question of unconstitutional nullification of the Ohio statutes can never be raised in any case.

**Limitation Upon the Inherent Powers of the Court.**

The instant case is not the first case to come before the Supreme Court of Ohio involving the [illegible] of the legislative branch of the government of Ohio to regulate the exercise of judicial power, whether the source of that judicial power be constitutional, statutory or inherent.

The decisions of this Court, as well as the decisions of the Supreme Court of Ohio rendered under a great variety of circumstances and in many aspects, recognize that one of the indispensable inherent powers of every court is the power to find a party, witness or person coming before the court in any capacity, guilty of contempt and to impose punishment accordingly.

In the state of Ohio the legislature has undertaken to *regulate* the exercise by the court of the inherent power of contempt and this regulation by the legislature has been in effect for over 100 years.

In the present Ohio Code of Statutes, the Ohio Revised Code, there will be found an entire chapter, Chapter 2705, containing ten sections specifying the procedure which must be followed by the courts of the state in contempt matters and the rights which are accorded by statute to persons charged with contempt of court.

In the case of *Ex Parte Morris*, 77 O. S. 598, 48 N. E. 1129, the Supreme Court of Ohio affirmed without opinion

the decision rendered in that case by an Ohio Circuit Court, reported in 8 O. C. C. N. S., 212, 18 O. C. D. 611. By such affirmance the Supreme Court of Ohio adopted as the correct rule the statement of the Circuit Court that it is the *duty* of the courts—

> "To conform to a statute which does not abridge (inherent) power but simply points out the manner in which it shall be exercised."

The second paragraph of the syilabus in that case states:

> **"While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power but simply points out the manner in which it shall be exercised."**

Surely there is no difference or distinction between whatever inherent powers a court may possess. Surely, if, as the Supreme Court of Ohio has stated, it has an inherent power to discipline members of the bar, that inherent power is of no greater degree or different quality than the inherent power of the same court in contempt proceedings. Surely, if, as the Supreme Court of Ohio has declared in the *Morris* case, 77 O. S. 598, 84 N. E. 1129, it is the duty of the court to conform to a statute which "simply points out the manner in which it (its inherent power) shall be exercised," this duty applies equally to the statutes of the State of Ohio, which have been so long in effect, relating to disciplinary complaints against members of the bar.

These considerations were called to the attention of the Supreme Court of Ohio in the present case, and its decision in the *Morris* case was cited but no comment was made by the court with respect to either the effect or the logic of its prior decision.

An annotation appearing in Vol. 121 *A. L. R.*, pp. 215 to 294, collects the cases dealing with the power of a legislature to *regulate* the power of the courts with respect to contempt proceedings. At page 235 of that volume, the annotator states:

> "Even while the power of the legislature to abridge or limit the inherent judicial power of courts to punish for contempt is denied, it is recognized and held in most jurisdictions that the legislature may make reasonable regulations governing the exercise of the power to punish for contempt."

It is a matter of great moment, not only to the people of the State of Ohio, but to the citizens of all states, that this Court define the limits beyond which no state court may go in nullifying or repealing by implication the procedural safeguards which have been enacted into law and which represent the policy of the people of the state.

It is a matter of great moment that the Supreme Court of the State of Ohio, as well as all other state courts, be admonished by this Court, that the exercise by such courts of their authority to discipline members of the bar may be regulated by statute and that procedural safeguards which have been enacted into law by the legislature for the benefit of members of the bar must be respected and obeyed by the courts, and may not be nullified or callously set aside.

This is a subject upon which this Court has not heretofore issued any pronouncement, although in the leading case of *Ex Parte Garland*, 71 U. S. 333, at p. 379, this Court pointed out in its opinion, with respect to the right to practice law before the courts of the United States:

> "The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescrit

qualifications for the pursuit of any of the ordinary applications of life."

The basis for such authority residing in the legislature was well stated by the Supreme Court of North Carolina in the decision rendered by it as long ago as 1906, entitled *In Re Applicants for License*, 143 N. C. 1:

> Syl. 2—"Revisal, Chapter 5, establishing the qualifications for applicants to practice law, is not unconstitutional as an unwarranted exercise of judicial power prohibited by Section 8 of the Declaration of Rights, nor as an unlawful attempt to deprive the court of its inherent power to direct and control the conduct of attorneys who are its officers."
>
> Syl. 3—"The legislature has the right to establish the qualifications to be required of one to become a practicing member of the bar by virtue of the police power which is vested in that body."

**The Question Relating to the Grounding of the Complaint Against Petitioner Upon an Invalid Judgment of the Supreme Court of Ohio.**

The complaint filed against the petitioner in this case contained only the single sentence:

> "Now comes the Cleveland Bar Association, the relator herein, and says that Henry H. Pleasant, the respondent, has been guilty of misconduct within the meaning of Rule 27, paragraph 5 of the Supreme Court of Ohio, as more specifically set forth in the case of In Re Estate of Wright, 165 O. S. 15."

If the judgment of the Supreme Court of Ohio in that case was beyond the jurisdiction of that court to render, and if the case was not properly before that court, then the entire basis of the complaint against the petitioner in this case must fall. In that event, there was nothing upon the basis of which the Supreme Court of Ohio could act,

and no finding could be made by that court, and no disciplinary order issued against the petitioner herein.

The case of *In Re Estate of Wright* was brought to the Supreme Court of Ohio by three lawyers acting solely in the capacity of amici curiae. At the very outset of its opinion in the case of *In Re Estate of Wright*, the Supreme Court of Ohio stated:

> "The cause is before this Court by reason of the allowance of a motion to certify the record, which motion was filed by Jack A. Persky, Victor DeMarco and John R. Kistner, amici curiae, by appointment by Walter T. Kinder, Judge of the Probate Court of Cuyahoga County."

It is not only contrary to the provisions of the statutes of Ohio, and contrary to the principles enunciated in all Ohio reported authorities, and contrary to the decisions in every reported authority in any jurisdiction in this country, state or federal, but it is a violation of the basic principles of due process of law that an appellate court shall accept an appeal brought to it by amici curiae and shall thereupon cause a decision to be rendered against the appellee who is the petitioner in this case, when no judgment, order or relief can be granted to, or in favor of, the amici curiae who are responsible for bringing the appeal.

It is further contended that it is a violation of the petitioner's constitutional rights and a deprivation of due process of law that the Supreme Court of Ohio should proceed to hear and to determine the complaint filed against him by the Cleveland Bar Association which was based upon the prior judgment of the Supreme Court of Ohio in the matter of the *Estate of Wright*, when, at the same time that such complaint was heard and determined there was pending before the Supreme Court of Ohio a

petition to vacate the judgment which that court had previously rendered in the *Wright* case.

It is suggested that the Supreme Court of Ohio owes a duty, not only to the petitioner, but to the entire bench and the bar of the State of Ohio to proceed to administer justice in an orderly manner.

It is suggested that the action of the Supreme Court of Ohio in hearing and determining the complaint of the Cleveland Bar Association, based upon a prior judgment of the same court, when that court had before it a pending petition to vacate its prior judgment, constitutes not only a deliberate refusal on the part of that court to administer justice in an orderly and even-handed manner, but constitutes a denial to the petitioner of due process of law.

It is suggested that the action of the Supreme Court of Ohio in declaring that a motion, filed with it to vacate the judgment in the *Wright* case, would be considered simply as a second application for a rehearing and, accordingly, summarily overruled, was a denial to the petitioner of due process of law.

It is suggested that the action of the Supreme Court of Ohio in directing the clerk of that court to return to the printer the first petition for vacation of the judgment in the *Wright* case, which petitioner sought to file with that court, is an indication of an entire lack of that orderly and even-handed administration of justice which due process of law requires.

No court of appellate jurisdiction in any state in this country, or elsewhere, and no court of appellate jurisdiction among the courts of the United States, has ever permitted the filing of an appeal by amici curiae, and the action in this regard in the *Estate of Wright* by the Supreme Court of Ohio, is utterly unique and without precedent.

The fact that this situation was not called to the attention of the Supreme Court of Ohio, and that the question was not raised before that court until for the first time in the filing by the appellant of a motion to vacate the judgment rendered in that case, could not have the effect of vesting that court with jurisdiction which it did not otherwise have.

There is no dispute about the law in Ohio on this subject. It has been clearly laid down by the Supreme Court of Ohio. On the general subject of who may appeal, the rule is stated in Vol. 2 *Ohio Jurisprudence*, 2d. Series, at page 757:

> "The laws regulating appeals in Ohio are such that only parties to the litigation may appeal from judgments or final orders of inferior tribunals."

In *The City of Middletown vs. City Commissioner of Middletown*, 138 O. S. 596, 603, 37 N. E. 2d. 609, 613. Judge Zimmerman writing the opinion of the court, stated:

> "The right of appeal is not an inherent or inalienable right but must be conferred by authority upon the person who would enjoy it. * * *. * * * and the apparent legislative intent was to confer the right of appeal on such persons as are parties to an action. * * *
>
> "Third persons are not authorized to act by the law; nor would good policy allow them to interfere and remove causes by appeal. It is manifest that such a practice could not be tolerated as it would produce many evils. Reid vs. Quigley, 16 Ohio 445, 447."

*Kennard vs. Kennard*, 35 O. S. 660:

> "To constitute a proceeding in error, there must be a plaintiff in error. *If there is no plaintiff in error, the court acquires no jurisdiction of the cause.*"

*Ohio Contract Carriers Association vs. Public Utilities Commission*, 140 O. S. 160, 42 N. E. 2d. 758:

Syl.: "*Appeal lies only on behalf of a party aggrieved* by the final order appealed from. *Appeals are not allowed* for the purpose of settling abstract questions but *only to correct errors injuriously affecting the appellant.*"

The only decision in Ohio specifically applying these principles to amici curiae, is the case of *Board of Commissioners of Montgomery County vs. Cooper's Unknown Heirs*, 50 Ohio Law Abs. 20, 75 N. E. 2d. 84, Appeal Dismissed 152 O. S. 202, 88 N. E. 2d. 293:

Syl. 2: "An amicus curiae has no right to become a party to an action, to except to rulings of court, or prosecute an appeal."

In its opinion, the court stated:

"By no principles of legal reasoning can a friend of the court become a party to the action."

That this is the accepted law in Ohio is evidenced by the following statement appearing in 2 *Ohio Jurisprudence* 2d 388:

"An amicus curiae does not become a party to the action in which he appears, and has no right to take upon himself the management of the cause. * * * Neither has he the right to except to the rulings of the court or to prosecute an appeal."

In the entire field of jurisprudence, including both adjective and substantive law, it is almost impossible to find any rule without an exception. It is submitted, however, that *this* rule, absolutely barring an amicus curiae from attempting to act as a party to a case and from prosecuting an appeal, is one rule without any exception. The cases stating the rule are so numerous that a single reference to the text of *Corpus Juris* should suffice, 3 C. J. S. 1051:

"Since, as stated in the title Appeal and Error, Sections 466, 491, no person can prosecute an appeal or writ of error unless he is a party or privy, or in some way aggrieved by the judgment, an amicus curiae has no right to prosecute an appeal or writ of error, or to maintain a bill of review, and the court cannot appoint an amicus curiae to represent it on appeal."

If it be asked by the members of this Court why the Supreme Court of Ohio undertook to allow an appeal prosecuted by amici curiae against the petitioner in this case, and then undertook to render a judgment against this petitioner, which that court must have anticipated would become the basis for the complaint subsequently filed against him by the Cleveland Bar Association in this proceeding—it is respectfully suggested that this action of the Supreme Court of Ohio was in the same category as the action of the court in summarily overruling a motion to vacate its judgment, and in the same category as the action of the court in deliberately directing the clerk of the court to refuse to accept and to file a petition to vacate its judgment which the petitioner sought to file, and in the same category as the action of the court in requiring three counsel representing the petitioner to make a 300-mile round-trip to the state capitol in order to assure that petitioner's petition to vacate the judgment in the *Wright* case would be accepted and filed by the Clerk of the Supreme Court of Ohio.

And, it is respectfully submitted that the action of that court is in the same category as the further action of the court in passing upon the complaint of the Cleveland Bar Association in this proceeding when the petition to vacate its judgment in the *Wright* case was still pending and constituted the basis for the complaint of the bar association.

## The Question Relating to the Invalidity of Rule 27 of the Supreme Court of Ohio.

This brief has already exceeded appropriate bounds in demonstrating the great importance and general interest of the constitutional questions involved. Petitioner cannot, however, fail to direct to the attention of the Court, as among issues of paramount importance in this case, the many provisions of Rule 27 of the Supreme Court of Ohio which contravene the requirements of due process of law.

We deem that it will suffice, at this time if a simple statement of the deficiencies of this rule is set forth and that no attempt be made here to argue such deficiencies, or to present the authorities upon the basis of which they may be demonstrated.

At the outset, it is contended that the entire procedure contemplated by Rule 27 of the Supreme Court of Ohio, involves an unconstitutional delegation of judicial power by the court. The rule itself is replete with authority vested in the Board of Commissioners on Grievances and Discipline, the exercise and application of which, by the members of that board, necessarily involves judicial power.

Since the procedure which the Supreme Court of Ohio has now set up is embodied in great detail in Rule 27, and the rights of the petitioner as a member of the bar under the provisions of this rule are only such rights as the rule itself allows him, he has been deprived of the privileges and the safeguards erected by statute for his benefit, and this also is a deprivation of his rights without due process of law.

There is no provision in the rule that the hearings conducted by the panel selected by the chairman of the Board of Commissioners shall be conducted in accordance with the rules of evidence, or that the hearings shall be conducted in a manner consonant with the requirements of a

fair hearing as contemplated within the meaning of due process of law.

There is no provision in the rule by means of which the petitioner could present and argue questions of law which might arise and which, in the ordinary course of events, should be determined before any hearing is commenced.

There is no provision in the rule for the presentation of a demurrer to a complaint filed against the petitioner or any member of the bar, and there is no provision in the rule for a ruling by the panel, or by the Board of Commissioners, upon a demurrer or any other question of law.

In fact, the record in the instant case discloses the existence of a grave doubt in the minds of the commissioners themselves concerning their right to take any action on legal questions raised prior to, or in the course of, the hearing. In the instant case this resulted in an injustice to the petitioner of so serious a nature as to deprive him of one of the essential prerequisites of due process of law. The complaint against him, as noted above, was couched in the most vague and general terms. Reference was made in the complaint only to the decision of the Supreme Court in 165 O. S. 15, a decision 12 pages in length.

There was no reference to any specific portion of this decision, or to any specific finding made by the court. There was no charge that the petitioner had violated any one, or more than one, of the Canons of Ethics.

When, notwithstanding the petitioner's understandable refusal to subject himself voluntarily to the jurisdiction of the Board, the petitioner sought to have the complaint made more specific, his attempt in this regard was summarily denied by the members of the panel. This, notwithstanding the fact that the provisions of Section 4705.-03, Revised Code, require the filing of written charges "stating distinctly the grounds of complaint."

There is, as noted above, no provision in the rule that the petitioner, or his counsel, may appear as a matter of right, at any time, in the presence of any court or judge. The fact that in the instant case the Supreme Court of Ohio saw fit to extend to the petitioner, as a matter of grace, the right to appear by counsel and to argue on a motion to show cause directed to the petitioner by the court, does not cure the infirmity of the rule itself. In failing to accord this privilege to the petitioner, as a matter of right, the rule is, in this respect, a denial of due process of law.

Finally, there is the matter of the invalid assessment of costs against the petitioner in the amount of approximately $800.00. All court costs in Ohio are governed and fixed by statute. Court costs in the average case in the Common Pleas Court of Cuyahoga County where the petitioner resides and practiced law, amount to no more than $30.00. Court reporters are furnished by the court and by statute their services are taxed by the court at the rate of $4:00 per day.

A single referee may be appointed by the court in an appropriate case, but no referee may be appointed under the Ohio statutes in any disbarment proceeding. In all of these matters, including the assessment of substantial costs against the petitioner, the Supreme Court has undertaken to legislate without authority of law and contrary to existing statutes.

## CONCLUSION.

The Supreme Court of Ohio is the first court of final jurisdiction in the United States to attempt, without statutory authority, to promulgate by rule of court a detailed procedure for the filing, hearing and determination of complaints against members of the bar and the basis for disciplinary action to be taken against members of the bar.

In the state of Ohio not only did the legislature fail to

provide the authority for devising and promulgating such procedure, but the Supreme Court undertook this step in the face of a form of procedure which had been specifically provided by legislation, and in the face of statutory safeguards provided for members of the bar as well as of the public which had been in effect for 133 years.

In no other state has any court attempted completely to disregard and utterly to nullify procedural provisions of any statute, regardless of the field of practice to which the statutory procedure may apply.

Bar associations throughout the country are observing closely, and with the greatest interest, the result of this unique and unprecedented experiment by the Ohio court. The members of this Court are, undoubtedly, fully aware of the concern with which bar associations throughout the country view the problem of discipline among the members of the bar.

If this unprecedented and unconstitutional attempt on the part of the Supreme Court of Ohio should succeed, simply because there is no authority to which the members of the bar of Ohio can appeal, and because the Supreme Court of the state of Ohio is, within the confines of that state, the final arbiter of the rights of all citizens of the state, including all members of the bar, it is clear that attempts will be made in many other states of the Union to follow the example of the Ohio court.

We believe that we have demonstrated that the people of the state of Ohio, through the provisions of both the present and the prior constitutions of the state, vested in the legislative branch of the government, the General Assembly of Ohio, full, complete and untrammeled authority to deal with any and every subject, including the practice of all of the professions.

We have demonstrated that from the earliest days of its existence, the people of the State of Ohio have established by legislative enactment a fixed policy and a declared procedure governing attorneys at law.

We have demonstrated the deficiencies in the court rule by virtue of which it fails to comply with the requirements of a fair hearing and of due process of law. And surely, again, as to these deficiencies, there is no other authority to whom the petitioner can appeal, and the action undertaken by the Supreme Court of Ohio will serve as a model for the courts of other states unless this Court raises an admonishing hand and declares that members of the bar are entitled to the same constitutional rights and privileges accorded to all other citizens of the United States.

We have, in the final analysis, we believe, demonstrated the prejudicial effects of all of the foregoing upon the petitioner in this case, including the peculiar inability of the petitioner to obtain any ruling from the Supreme Court of Ohio with respect to the jurisdictional basis for the action of that court upon which the complaint in this proceeding was grounded.

All of this appears even more significant when it is considered that, in fact, the petitioner defrauded no one and mistreated no one. Nevertheless, the Supreme Court of Ohio declared that the petitioner had deceived and defrauded a probate judge, in spite of the fact that the judge himself testified in this proceeding that the petitioner's conduct was regular and proper and that he, the judge, expected nothing of the petitioner in the case which the petitioner had not done.

The instant case is identified as case No. 1, on the Disciplinary Docket of the Supreme Court of Ohio. The

importance of this case, and of the issues involved, both to the Supreme Court of Ohio and to all members of the bar of that state, is evidenced by the following statement in a communication addressed by the clerk of that court to one of counsel for the petitioner:

> "In view of the importance of this case, and so there will be no mistake made in preparing the record for the Supreme Court of the United States, we request that you send us a praecipe which identifies the documents which you desire included in the record."

This is a land mark case.

Unless this Court intervenes, there is no recourse for this petitioner, or for any member of the bar of the State of Ohio, from the judicial legislation in which the Supreme Court of Ohio has indulged; for within the confines of the State of Ohio that court has the last word even though it amounts to the nullification of the statutes of the state.

Respectfully submitted,

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